UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DONNA E. EDDY,)
)
Plaintiff)
)
v.) *Civil No. 89-0090 P*
)
STRATOS G. DEMAKIS,)
)
Defendant)

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS

In this 42 U.S.C. ' 1983 civil rights action, the plaintiff, a private individual, claims that the defendant, at all times relevant to this action a municipal police officer, has used his position as a police officer to deprive her of multiple constitutional rights under the First, Fourth, Fifth and Fourteenth Amendments. *See* Amended Complaint, Counts I-XII.[1] Before the court now is the defendant's motion under Fed. R. Civ. P. 12(b)(1) for dismissal based on lack of subject matter jurisdiction. The plaintiff opposes this motion and in support has submitted the deposition of John Gendron.

Under ' 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

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[1] The plaintiff specifically alleges deprivation of her First and Fourteenth Amendment rights of freedom of association, freedom of speech, petition and privacy; Fourth and Fourteenth Amendment rights of privacy; and Fifth and Fourteenth Amendment rights of privacy and substantive due process. The action includes several pendent state claims.

> shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The defendant's motion treats the "under color of [state law]" language as a jurisdictional prerequisite and argues that the plaintiff has failed to show that the alleged illegal actions were state action or taken under color of state law, and that therefore this court lacks jurisdiction over the matter.

I decline to address the defendant's motion under Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction) but instead will treat it as one under 12(b)(6) (failure to state a claim upon which relief can be granted). The proper question in a 12(b)(1) challenge to this action is not whether the alleged action was actually taken under color of state law but whether the complaint adequately asserts that the claim arose under federal law.

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.

Bell v. Hood, 327 U.S. 678, 682 (1946). *See also Ortiz de Arroyo v. Barcelo*, 765 F.2d 275, 279-80 (1st Cir. 1985) (a court may not refuse jurisdiction over ' 1983 claim merely because plaintiffs seek a remedy which may not be available under that statute); *Carter v. Norfolk Community Hospital Association, Inc.*, 761 F.2d 970, 974 (4th Cir. 1985) (dismissal of ' 1983 claim based on absence of state action should have been under 12(b)(6) and not 12(b)(1)); S. Nahmod, *Civil Rights and Civil Liberties Litigation* ' 2.04 at p. 77 (1986). Because the memoranda of both parties address the sufficiency of the plaintiff's allegations of state action, I find no reason not to consider the motion to dismiss under 12(b)(6). *Dennis v. Hein*, 413 F. Supp. 1137, 1139 (D.S.C. 1976). To avoid conversion of the motion to dismiss under 12(b)(6) into a motion for summary judgment under Fed. R. Civ. P. 56, I consider only the sufficiency of the complaint and not the deposition of John Gendron submitted by the plaintiff.

The purpose of a 12(b)(6) motion to dismiss is "to test the formal sufficiency of the statement of the claim for relief"; such a motion differs from a Fed. R. Civ. P. 56 motion for summary judgment "which goes to the merits of the claim and is designed to test whether there is a genuine issue of material fact." 5 C. Wright & A. Miller, *Federal Practice and Procedure* ' 1356 at pp. 590, 592 (1969). The defendant here argues that the plaintiff's complaint does not sufficiently allege any action taken under color of state law.

In *United States v. Classic*, 313 U.S. 299, 326 (1941), the Supreme Court stated that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken `under color of' state law." A few years later, the Supreme Court held that a local sheriff and his assistants had acted under color of state law in the use of excessive force pursuant to an arrest.

> Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.

Screws v. United States, 325 U.S. 91, 111 (1945). Relying on *Classic* and *Screws*, the Court in *Monroe v. Pape*, 365 U.S. 167 (1961), developed its current formulation of the state action/color of law requirement applicable to police officer defendants. "Congress in enacting ' 1979,[2] meant to give a

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[2] Section 1983 was previously codified at 42 U.S.C. ' 1979.

remedy to parties deprived of constitutional rights, privileges and immunities by an official's *abuse* of his position." *Id.* (emphasis added).

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the issue was whether the actions of a private party creditor in securing a prejudgment attachment against a debtor constituted both state action under the Fourteenth Amendment, as well as action taken "under color of law" for purposes of ' 1983.[3] The Court noted that in cases such as the one before this court where the defendant is a public official, "the statutory requirement of action `under color of state law' and the `state action' requirement of the Fourteenth Amendment are identical." *Lugar*, 457 U.S. at 929; *see also id.* at 937. Thus "state employment is generally sufficient to render the defendant a state actor . . . ." *Id.* at 936 n.18. The Court then emphasized that "[c]areful adherence to the `state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the state, its agencies, or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.* at 936. Thus conduct creating liability under ' 1983 must be "fairly attributable" to the state, *i.e.*, it must be caused by "the exercise of some right or privilege created by the State or by

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[3] The Fourteenth Amendment prohibits the states from making or enforcing any law which deprives any person of due process or equal protection rights, and thus only "state action" may effect a violation of the Amendment. 42 U.S.C. ' 1983 provides a remedy for deprivation of constitutional and federal statutory rights when such deprivations occur "under color of [state law]." *Lugar v. Edmondson Oil Co.*, 457 U.S. at 924.

a rule of conduct imposed by the State or by a person for whom the State is responsible" and "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* at 937.[4]

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[4] Both parties cite to the recent Supreme Court decision of *West v. Atkins*, 487 U.S. ___, 108 S. Ct. 2250. In *West*, the Court further analyzed the state action/color of law requirement in actions where the ' 1983 defendant is a private party professional who is expected to exercise professional independence but who is also an employee of the state. The *West* Court did not alter the definition of the state action/ color of law requirement as it applies to a state official such as the police officer defendant in this case.

The First Circuit Court of Appeals appears not to have directly addressed this issue in an action involving a single police officer defendant.[5] In *Bonsignore v. City of New York*, 683 F.2d 635, 638-39 (2nd Cir. 1982), the Second Circuit, relying on *Screws*, 325 U.S. at 111, held that an off-duty officer who shot his wife was not acting under color of state law. Likewise, the Fifth Circuit has found that an on-duty police officer who assaulted his sister-in-law did not act under color of state law. *See Delcambre v. Delcambre*, 635 F.2d 407 (5th Cir. 1981). Not surprisingly, however, the Tenth Circuit found that an off-duty policy officer acting as a private security guard acted under color of law when he effected an arrest by identifying himself as a police officer and by using police documents to get information. *See Lusby v. T. G. & Y. Stores, Inc.*, 749 F.2d 1423, 1430 (10th Cir. 1984).

In the action now before this court, the plaintiff specifically alleges that the defendant was a police officer during the relevant period, Amended Complaint & 4;[6] that in his capacity as a police officer the defendant contacted John Gendron, falsely informed him that the plaintiff had been terminated from her former employment for embezzling funds and asked Mr. Gendron to aid the

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[5] Several First Circuit opinions have addressed the state action/color of law question in the context of actions allegedly taken by private individuals in concert with state actions. *See D'Amario v. Providence Civic Center Authority*, 783 F.2d 1 (1st Cir. 1986); *Johnson v. Educational Testing Service*, 754 F.2d 20 (1st Cir. 1985); *McGillicuddy v. Clements*, 746 F.2d 76 (1st Cir. 1984). *See also Hudson v. S.D. Warren* Co., 665 F. Supp. 937 (D. Me. 1987).

[6] All subsequent references to specific allegations are to the numbered paragraphs in the Amended Complaint.

police in the investigation by passing this information on to the plaintiff's current employer, && 35-36; and that Mr. Gendron did pass the information on to the plaintiff's employer, & 37.

I find that these allegations are sufficiently specific to assert a claim that the defendant acted under color of state law for purposes of a ' 1983 action. The defendant's status as a police officer clothes him with "the authority of state law," *Classic*, 313 U.S. at 326; his alleged action in contacting Mr. Gendron was taken under "`pretense' of law," *Screws*, 325 U.S. at 111; the plaintiff alleges that he misused or abused his position as a police officer in contacting Mr. Gendron with false information about her, *see Monroe v. Pape*, 365 U.S. at 171-72; and his alleged action is thus "fairly attributable" to the state, *Lugar*, 457 U.S. at 937. Moreover, although these alleged actions may have been motivated by private feelings, they were clearly facilitated by the authority of state law, and thus were not "the acts of officers in the ambit of their personal pursuits," *Screws*, 325 U.S. at 111; *see also Griffin v. Maryland*, 378 U.S. 130, 135 (1964); *cf. Bonsignore v. City of New York*, 683 F.2d at 638-39 with *Lusby v. T. G. & Y. Stores, Inc.*, 749 F.2d at 1430.

Accordingly, I conclude that the complaint sufficiently alleges that the defendant acted under color of state law and I therefore recommend that the defendant's motion to dismiss be ***DENIED***.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 4th day of August, 1989.

David M. Cohen
United States Magistrate